

**DELTA STEWARDSHIP COUNCIL
CALIFORNIA CODE OF REGULATIONS, TITLE 23. WATERS, DIVISION 6. DELTA
STEWARDSHIP COUNCIL
ARTICLE 5, APPEALS OF CERTIFICATIONS OF CONSISTENCY**

ARTICLE 5. APPEALS OF CERTIFICATIONS OF CONSISTENCY

SECTION 5020. SCOPE

This article applies to appeals of the adequacy of certifications of consistency with the Delta Plan filed with the council by a certifying agency pursuant to Water Code sections 85225.10 and 85225.30.

NOTE: Authority cited: Sections 85001, 85020, 85022, 85057.5, 85200, 85210, 85225, 85225.5, 85225.10, 85225.15, 85225.20, 85225.25, 85225.30, 85300, and 85320, Water Code.

SECTION 5021. FILINGS AND MAILINGS

(a)(1) All filings, submissions, and mailings required to be submitted pursuant to this article shall be made electronically. Filings, submissions, and mailings shall be in 12-point black font.

(2) The council encourages electronic submittals to comply with the Web Content Accessibility Guidelines 2.0, or a subsequent version effective at the time of the filing of the certification of consistency, published by the Web Accessibility Initiative of the World Wide Web Consortium at a minimum Level AA success criteria.

(b) If the last day for a filing or submissions to the council required pursuant to this article is a weekend or a State holiday, that deadline shall be the next business day.

NOTE: Authority cited: Section 12a, Code of Civil Procedure; Sections 7405, 11135, and 11546.7, Government Code; Section 85225.30, Water Code.

SECTION 5022. FILING OF APPEAL

(a) No later than 30 calendar days after the date a certification of consistency is filed

with the council, any person, including a member of the council or its executive officer, or delegee, may file an appeal claiming that a proposed covered action is inconsistent with the Delta Plan and, as a result of that inconsistency, that action will have a significant adverse impact on the achievement of one or both of the coequal goals of the Sacramento-San Joaquin Delta Reform Act of 2009 (Wat. Code, § 85000 et seq.) or implementation of government-sponsored flood control programs to reduce risks to people and property in the Delta.

(b) All appeals shall be in writing and filed with any supporting documentation through the council's covered actions portal and shall be public records consistent with the California Public Records Act (Gov. Code § 7920.000 et seq.).

(c) An appeal shall be in writing and clearly and specifically set forth the basis for the claim that the covered action is inconsistent with the Delta Plan. It shall contain all of the following:

(1) Appellant's name, residence address or mailing address, email address, and telephone number.

(2) The project name of the covered action, and identification number issued by the council.

(3) The name of the certifying agency.

(4) A statement of the factual allegations upon which the appeal is based.

(5) A list of the specific Delta Plan policies that the appellant alleges the proposed covered action is inconsistent with, and for each policy identified, both of the following:

(A) A concise statement of the authority, evidence, and arguments relied on to support the appellant's claim that the proposed covered action is inconsistent with the Delta Plan policy.

(B) How the claimed inconsistency will have a significant adverse impact on one or both of the coequal goals or the implementation of a government-sponsored flood control program to reduce risks to people and property in the Delta.

(d)(1) An appeal shall be considered timely when received by the council no later than 5:00 p.m. (PT) on the 30th calendar day following the council's receipt of the certification of consistency.

(2) The effective date of a timely appeal shall be the 30th day after the date of receipt of the certification of consistency.

(3) A copy of the appeal shall be stamped "Filed" with the effective date. The effective date of filing shall govern the timeframe established by Water Code section 85225.20.

(e)(1) No later than five calendar days after the council has posted a notice of appeal

pursuant to subsection (a), a certifying agency shall submit to the council the record that was before the certifying agency at the time it made its certification. The record shall be certified by the agency as being “full and complete.”

(2) Any modifications to the certified record shall be subject to this article.

(3) A certifying agency is strongly encouraged to either submit or make the record publicly available at the time it files its certification of consistency and provide information on its location in the certification.

(4) The failure by a certifying agency to submit the record to the council on a timely basis as required pursuant to paragraph (1) shall be grounds for the council to remand the matter to the certifying agency on the basis that there was not substantial evidence presented to support the certification of consistency.

NOTE: Authority cited: Sections 6707 and 11020, Government Code; Sections 85225.10, 85225.15, 85225.20, and 85225.30, Water Code.

SECTION 5023. NOTICE OF APPEAL

(a) Within five business days of the effective date of an appeal, the executive officer, or delegee, shall do all of the following:

(1) Post a notice and brief description of the appeal and its effective date in a conspicuous location in the council's office and on its website.

(2) Mail to the affected certifying agency and to any third party whose proposal is the subject of the certification a copy of the notice, a brief description, and a copy of the appeal documents filed with the council.

(3) Mail copies of the appeal to each member of the council, and to the Delta Protection Commission for informational purposes consistent with Public Resources Code section 29773.

(4) Mail notice to the appellant that the appeal has been filed and stating the effective date of filing.

(b) The council or executive officer, or delegee, may issue supplemental notices as necessary.

(c) Notices shall be mailed electronically consistent with section 5021.

NOTE: Authority cited: Section 85225.30, Water Code.

SECTION 5024. EX PARTE COMMUNICATIONS

(a) Hearings on appeals are subject to the ex parte communication restrictions of the

Administrative Procedure Act (Gov. Code § 11430.10 et seq.). Pursuant to Government Code section 11430.10, an ex parte communication is a "communication, direct or indirect, regarding any issue in the proceeding, to the [council or council member] from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication."

(b) The restrictions on ex parte communications apply from the date the appeal is filed to the date that the council issues a final decision on the appeal.

(c) To ensure compliance with this section, council members shall avoid ex parte communications while an appeal is pending. If a council member receives an ex parte communication, including, but not limited to, by an individual sending a letter to a council member concerning a pending appeal matter, the council member shall notify the council's legal adviser or executive officer.

(d) At the first appropriate publicly noticed council meeting after an appeal is filed, the council's legal adviser shall remind the council of this ex parte communications restriction and answer questions about its scope.

NOTE: Authority cited: Sections 11430.10 and 11430.80, Government Code; Section 85225.30, Water Code.

SECTION 5025. ADDITIONAL INFORMATION FROM APPELLANT

The council or its executive officer, or delegee, may request from the appellant further information necessary to clarify, amplify, correct, or otherwise supplement the information submitted with the appeal to be provided by the deadlines specified by the council or its executive officer, or delegee. The council or its executive officer, or delegee, may dismiss the appeal for the failure of the appellant to provide information requested by a specified deadline if the information requested is in the possession of or under the control of the appellant.

NOTE: Authority cited: Sections 85225.10, 85225.20, 85225.25, and 85225.30, Water Code.

SECTION 5026. SUPPLEMENTAL RECORD

(a) The council or its executive officer, or delegee, may supplement the record submitted by the certifying agency if the council or its executive officer, or delegee, determines that additional information was part of the record before the certifying agency at the time of certification but was not included in the certifying agency's record submitted to the council.

(b) Any party to an appeal and the Delta Protection Commission may submit a request to the council to supplement the record with additional documentation or

information that was part of the record before the certifying agency but was not included in the certifying agency's submission to the council. That request, including the documentation or information requested for admission, shall be submitted to the council by the deadline specified by the council for that type of submission in the applicable notice. Requests that are not submitted by the specified deadline in the required format or that do not include the required documentation or information shall not be considered for admission.

(c) To be considered for admission pursuant to this section, each request shall include for each specific document or information requested to be considered for admission all of the following:

(1) Specification that the request is being submitted pursuant to this section.

(2) The documentation or information that is the subject of the request. Each document or information that is the subject of a request shall be provided as a separate electronic document or file. Multiple documents or information submitted as one electronic file shall not be considered for admission.

(3) Specific evidence that the document or information requested for admission was part of the record before the certifying agency prior to the date of the council's receipt of the certification.

NOTE: Authority cited: Sections 85225.10, 85225.20, 85225.25, and 85225.30, Water Code.

SECTION 5027. SCHEDULES AND ORAL PRESENTATIONS

(a)(1) All deadlines and scheduling related to an appeal, including, but not limited to, hearings, written submissions, and requests for admission of additional information pursuant to sections 5026 and 5032, shall be specified in a notice issued by the council or executive officer, or delegee, except as already specified by statute or this article.

(2) Requests and submissions provided after the deadlines specified in the applicable notice shall not be considered.

(b) The council shall conduct a hearing on an appeal in a manner deemed most suitable to ensure fundamental fairness to all parties concerned and with a view toward securing all relevant information and material necessary to render a decision without unreasonable delay.

(c) The hearing shall not be subject to common law, statutory rules of evidence, or technical or formal rules of procedure, except as set forth in in this article. Unduly repetitious or irrelevant evidence may be excluded upon order of the council, chair, or executive officer.

(d) Except as provided in sections 5026 and 5032, evidence is limited to the record that was before the certifying agency prior to the council's receipt of the certification of

consistency. The record shall not include a transcript of any proceedings before the certifying agency unless provided by a party to the proceedings or requested by the council.

(e)(1) The appellant and certifying agency may each make oral presentations regarding the appeal at the time and date of the hearing set forth in the notice issued by the council or executive officer, or delegee pursuant to this section.

(2) Presentations shall address the issues and facts raised in the appeal and shall be as brief as possible.

(3) The council or executive officer, or delegee, shall have the discretion to set time limits on oral presentations and decide the order of the presenters. The certifying agency shall be afforded the combined amount of presentation time that is afforded to the appellant.

(f) Council members may ask questions of the appellant, the certifying agency, the Delta Protection Commission, any third party appearing at the hearing, or council staff. The questioning of speakers at the hearing by other persons shall not be permitted except by permission of the council, chair, or executive officer.

(g) Any person other than the certifying agency or appellant may provide oral comment or written comments to the council concerning an appeal in accordance with the Bagley-Keene Open Meeting Act (Gov. Code, § 11120 et seq.). Written comments may be submitted any time, but to ensure that written comments may be circulated to council members for their review ahead of the applicable meeting concerning an appeal, written comments shall be submitted to the council at least 10 calendar days prior to that meeting. Written comments may be submitted electronically.

NOTE: Authority cited: Section 11125.7, Government Code; Sections 85225.10, 85225.20, 85225.25, and 85225.30, Water Code.

SECTION 5028. DELTA PROTECTION COMMISSION COMMENTS

(a) (1) The Delta Protection Commission may submit written comments on issues raised by an appellant in an appeal and whether the certification of consistency for the proposed covered action is supported by substantial evidence in the record before the certifying agency.

(2) The Delta Protection Commission may further make an oral presentation to the council regarding issues raised by an appellant in an appeal at the time and date of

the hearing on the appeal.

(b) The council shall consider the comments and presentation submitted by the Delta Protection Commission regarding issues raised by an appellant as those of an expert in matters that may affect the unique cultural, recreational, and agricultural values of the Delta when preparing, considering, and adopting its findings.

NOTE: Authority cited: Section 85225.30, Water Code.

SECTION 5029. DOCUMENTATION AND WRITTEN SUBMISSIONS

(a) Documentation and information provided with a written submission and not included in the record submittal by the certifying party shall be subject to the requirements of sections 5026 and 5032 for consideration of admissibility, as applicable based upon the request for admission.

(b) Each submittal shall include a cover sheet that lists all of the following information in the following order:

(1) The project name of the covered action and identification number issued by the council.

(2) The name of the party submitting the document.

(3) The date of submittal.

(4) The document title.

(c)(1) A written submission by an appellant or the Delta Protection Commission in support of an appeal shall provide specificity for each appealed policy, which shall include citations to evidence in the record, to support the grounds for appeal identified in the appeal.

(2) An appellant or the Delta Protection Commission shall not introduce additional grounds for appeal in a written submission. Those additional grounds shall not be considered as part of the appeal.

(d) The certifying agency's written submission shall respond to the allegations of the appeal. To the extent possible, the certifying agency shall cite to evidence in the record to support the certification of consistency. This requirement shall not be construed to relieve an appellant's burden to show that the certification of consistency is not supported by substantial evidence in the record.

NOTE: Authority cited: Section 85225.30, Water Code.

SECTION 5030. HEARING

(a) The council shall hear appeals of certifications of consistency filed pursuant to Water Code section 85225 within 60 days of the effective date.

(b) Notwithstanding subsection (a), the council may hear an appeal for a certification of consistency outside of 60 days of the effective date if any of the following:

(1) The parties and the council or executive officer, or delegee, agree to an extension, taking into account the circumstances of the matter subject to appeal, council's hearing schedule, and associated workload.

(2) Prior to the hearing, the council or its executive officer, or delegee, determines that the issues raised on appeal are not within the council's jurisdiction or do not raise an appealable issue.

(3) The council or its executive officer, or delegee, determines that all issues raised on appeal are moot.

(4) The council or its executive officer, or delegee, determines that all issues on appeal should be dismissed or the matter remanded for failure to comply with this article.

(5) The council or its executive officer, or delegee, remands the matter to the certifying agency for failure to submit the record pursuant to the procedures governing the filing of a certification of consistency.

(c) The council may hold additional hearings or workshops at its discretion and as it deems necessary.

(d) The council, upon a determination of good cause, may continue the hearing.

NOTE: Authority cited: Sections 85225, 85225.10, 85225.20, and 85225.30, Water Code.

SECTION 5031. CONSOLIDATION

(a) The council, at its discretion, may consolidate appeals raising similar issues.

(b) The council or its executive officer, or delegee, may address issues related to this article in individual or consolidated appeals as necessary to further the interests of justice.

NOTE: Authority cited: Sections 85225.5 and 85225.30, Water Code.

SECTION 5032. OFFICIAL NOTICE IN A HEARING

(a) Notwithstanding any other provision of this article, the council may take official notice in any hearing that it conducts of any generally accepted technical or scientific

matter within the council's jurisdiction and of any fact that may be judicially noticed by a court.

(b)(1) A party to an appeal and the Delta Protection Commission may submit a request to the council to take official notice of additional information that was not included in the certifying agency's submitted record to the council. That request, including the documentation or information requested for admission, shall be submitted to the council by the deadline specified by the council for those submittals in the applicable notice.

(2) Requests for additional information that are not submitted by the council's deadline in the required format or that do not include the required documentation or information shall not be considered for admission.

(c) To be considered for admission pursuant to this section, each request for each specific document or information requested to be considered for admission shall include all of the following:

(1) Specification that the request is being submitted pursuant to this section.

(2) The documentation or information that is the subject of the request. Each document or information that is the subject of a request shall be provided as a separate electronic document or file. Multiple documents or information submitted as one electronic file shall not be considered for admission.

(3) Specific evidence that the information requested for admission is of the following:

(A) A generally accepted technical or scientific matter within the council's jurisdiction.

(B) A fact that may be judicially noticed by a court.

NOTE: Authority cited: Section 11515, Government Code; Section 85225.30, Water Code.

SECTION 5033. ISSUANCE OF DECISION

(a) The council shall make a decision on the appeal with specific written findings within 60 days of hearing the appeal.

(b) The parties and the council or the executive officer, or delegee, may agree to an extension of the time for the council's decision considering the circumstances of the matter subject to appeal, council's hearing schedule, and associated workload.

NOTE: Authority cited: Sections 85210.5, 85225.20, 85225.25, and 85225.30, Water Code.

SECTION 5034. IMPLEMENTATION OF COVERED ACTION

A covered action that is the subject of an appeal shall not be implemented unless at least one of the following conditions has been met:

(a) The council has found that no appellant has shown that the certification of consistency is not supported by substantial evidence in the record on any appealed issue.

(b) After remand, all of the following have occurred:

(1) The certifying agency has decided to proceed with the action as proposed or modified.

(2) The certifying agency has filed with the council a revised certification of consistency addressing each of the findings made by the council and any changes made to the proposed action.

(3) Thirty days has elapsed, and no person has appealed the revised certification.

(c) The appellant has withdrawn the appeal.

(d) The council or its executive officer, or delegee, has dismissed the appeal pursuant to this article.

(e) If, after hearing an appeal, the council has not adopted findings that the appellant has shown that the certification of consistency is not supported by substantial evidence in the record.

NOTE: Authority cited: Sections 85225.20, 85225.25, and 85225.30, Water Code.

SECTION 5035. APPEAL FOLLOWING REMAND

(a) An appeal of a revised certification of consistency following a remand shall be limited to either of the following:

(1) An alleged failure to address each of the council's findings on the remanded issues.

(2) Issues resulting from material changes to the covered action.

(b) Except as provided in subsection (a)(2), a person shall not raise new grounds for appeal that were not raised in a prior appeal or reassert grounds that were raised or were rejected by the council. Those grounds may be considered non-appealable issues and dismissed.

NOTE: Authority cited: Sections 85210.5, 85225.5, 85225.25, and 85225.30, Water

Code.